

State of South Dakota

EIGHTY-FOURTH SESSION LEGISLATIVE ASSEMBLY, 2009

472Q0313

HOUSE ENGROSSED NO. **HB 1203** - 2/12/2009

Introduced by: Representatives Hunt, Bolin, Brunner, Cronin, Deadrick, Faehn, Gosch, Krebs, Novstrup (David), Peters, Rausch, Rave, Russell, and Steele and Senators Rhoden, Bartling, Fryslie, Gant, and Howie

1 FOR AN ACT ENTITLED, An Act to limit asbestos-related liabilities for certain successor
2 corporations.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

4 Section 1. That chapter 20-9 be amended by adding thereto a NEW SECTION to read as
5 follows:

6 Terms used in this Act mean:

- 7 (1) "Corporation," any corporation for profit, including a domestic corporation organized
8 under the laws of this state or a foreign corporation organized under laws other than
9 the laws of this state;
- 10 (2) "Innocent successor," any corporation that assumes or incurs or has assumed or
11 incurred successor asbestos-related liabilities and that became a successor before
12 January 1, 1972, or any successors of that corporation, and that after a merger or
13 consolidation did not continue in the business of mining asbestos, in the business of
14 selling or distributing asbestos fibers, or in the business of manufacturing,



1 distributing, removing, or installing asbestos-containing products that were the same
2 or substantially the same as those products previously manufactured, distributed,
3 removed, or installed by the transferor;

4 (3) "Transferor," any corporation from which successor asbestos-related liabilities are
5 or were assumed or incurred.

6 Section 2. That chapter 20-9 be amended by adding thereto a NEW SECTION to read as
7 follows:

8 For the purposes of this Act, an asbestos claim is any claim, wherever or whenever made,
9 for damages, losses, indemnification, contribution, or other relief arising out of, based on, or in
10 any way related to asbestos, including:

11 (1) The health effects of exposure to asbestos, including a claim for personal injury or
12 death, mental or emotional injury, risk of disease or other injury, or the costs of
13 medical monitoring or surveillance;

14 (2) Any claim made by or on behalf of any person exposed to asbestos, or a
15 representative, spouse, parent, child, or other relative of the person; and

16 (3) Any claim for damage or loss caused by the installation, presence, or removal of
17 asbestos.

18 Section 3. That chapter 20-9 be amended by adding thereto a NEW SECTION to read as
19 follows:

20 For the purposes of this Act, successor asbestos-related liabilities are any liabilities, whether
21 known or unknown, asserted or unasserted, absolute or contingent, accrued or unaccrued,
22 liquidated or unliquidated, or due to become due, which are related to asbestos claims and were
23 assumed or incurred by a corporation as a result of, or in connection with, a merger or
24 consolidation, or the plan of merger or consolidation related to the merger or consolidation with

1 or into another corporation, or that are related in any way to asbestos claims based on the
2 exercise of control or the ownership of stock of the corporation before the merger or
3 consolidation. The term includes liabilities that, after the time of the merger or consolidation
4 for which the fair market value of total gross assets is determined, pursuant to section 6 of this
5 Act, were or are paid or otherwise discharged, or committed to be paid or otherwise discharged,
6 by or on behalf of the corporation, or by a successor of the corporation, or by or on behalf of a
7 transferor, in connection with settlements, judgments, or other discharges in this state or another
8 jurisdiction.

9 Section 4. That chapter 20-9 be amended by adding thereto a NEW SECTION to read as
10 follows:

11 The cumulative successor asbestos-related liabilities of any innocent successor corporation
12 are limited to the fair market value of the total gross assets of the transferor determined as of the
13 time of the merger or consolidation. The innocent successor corporation does not have
14 responsibility for successor asbestos-related liabilities in excess of this limitation.

15 Section 5. That chapter 20-9 be amended by adding thereto a NEW SECTION to read as
16 follows:

17 If the transferor had assumed or incurred successor asbestos-related liabilities or liabilities
18 in connection with a prior merger or consolidation with a prior transferor, then the fair market
19 value of the total assets of the prior transferor determined as of the time of the earlier merger
20 or consolidation shall be substituted for the limitation set forth in section 4 of this Act for
21 purposes of determining the limitation of liability of an innocent successor corporation.

22 Section 6. That chapter 20-9 be amended by adding thereto a NEW SECTION to read as
23 follows:

24 Any innocent successor corporation may establish the fair market value of total gross assets

1 for the purpose of the limitations under sections 4 and 5 of this Act through any method
2 reasonable under the circumstances, including:

3 (1) By reference to the going concern value of the assets or to the purchase price
4 attributable to, or paid for, the assets in arms-length transactions; or

5 (2) In the absence of other readily available information from which the fair market value
6 can be determined, by reference to the value of the assets recorded on a balance sheet.

7 Total gross assets include intangible assets. To the extent total gross assets include any
8 liability insurance that was issued to the transferor whose assets are being valued for purposes
9 of this section, the applicability, terms, conditions, and limits of such insurance are not affected
10 by this section, nor does this section otherwise affect the rights and obligations of an insurer,
11 transferor, or successor under any insurance contract or any related agreements, including pre-
12 enactment settlements resolving coverage-related disputes, and the rights of an insurer to seek
13 payment for applicable deductibles, retrospective premiums, or self-insured retentions or to seek
14 contribution from a successor for uninsured or self-insured periods or periods where insurance
15 is uncollectible or otherwise unavailable. Without limiting the foregoing, to the extent total
16 gross assets include any such liability insurance, a settlement of a dispute concerning any such
17 liability insurance coverage entered into by a transferor successor with the insurers of the
18 transferor before the date of enactment of this Act shall be determinative of the total coverage
19 of such liability insurance to be included in the calculation of the transferor's total gross assets.

20 Section 7. That chapter 20-9 be amended by adding thereto a NEW SECTION to read as
21 follows:

22 The fair market value of total gross assets at the time of the merger or consolidation shall
23 increase annually at a rate equal to the sum of the prime rate as listed in the first edition of the
24 *Wall Street Journal* published for each calendar year since the merger or consolidation, unless

1 the prime rate is not published in that edition of the *Wall Street Journal*, in which case any
2 reasonable determination of the prime rate on the first day of the year may be used, plus one
3 percent. This rate may not be compounded. The adjustment of the fair market value of total
4 gross assets shall continue as provided in this section until the date the adjusted value is first
5 exceeded by the cumulative amounts of successor asbestos-related liabilities paid or committed
6 to be paid by or on behalf of the innocent successor corporation or a predecessor or by or on
7 behalf of a transferor after the time of the merger or consolidation for which the fair market
8 value of total gross assets is determined.

9 No adjustment of the fair market value of total gross assets may be applied to any liability
10 insurance that may be included in the definition of total gross assets by section 6 of this Act.

11 Section 8. That chapter 20-9 be amended by adding thereto a NEW SECTION to read as
12 follows:

13 The provisions of sections 4 and 5 of this Act do not apply to any of the following:

- 14 (1) Workers' compensation benefits paid by or on behalf of an employer to an employee
15 under the provisions of Title 62, or a comparable workers' compensation law of
16 another jurisdiction;
- 17 (2) Any claim against a corporation that does not constitute a successor asbestos-related
18 liability; or
- 19 (3) Any obligation under the National Labor Relations Act, 29 U.S.C. section 151, et
20 seq., or under any collective bargaining agreement.

21 Section 9. That chapter 20-9 be amended by adding thereto a NEW SECTION to read as
22 follows:

23 The provisions of this Act apply to all asbestos claims filed against an innocent successor
24 after June 30, 2009.